IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 284

U. S. BULK CARRIERS, INC.,

Petitioner,

v.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

Chronological List of Relevant Docket Entries

Nov. 7, 1966—Plaintiff's Complaint, filed.

Dec. 20, 1966—Defendant's Answer, filed.

April 19, 1967—Motion of Defendant for Summary Judgment. Affidavit in support of Motion and Attachments, filed. (Filed Separately)

April 25, 1967—Answer of Plaintiff, Affidavit and Memorandum in Support Thereof in Opposition to Defendant's Motion for Summary Judgment, filed.

April 26, 1967—Deposition of Plaintiff on behalf of Defendant, filed. (Filed Separately)

April 26, 1967—Hearing on Motion of Defendant for Summary Judgment before the Court, (Harvey, J.)

May 3, 1967—Excerpt of Transcript of hearing before Harvey, J. April 26, 1967, filed.

May 5, 1967—Order (Harvey, J.) "GRANTING" Defendant's Motion for Summary Judgment with cost to be paid by the Plaintiff, filed. (Notice Mailed 5/5/67)

June 1, 1967—Notice of Appeal of Plaintiff, filed. (Copy mailed by counsel)

April 4, 1969—Opinion and Judgment of the Court of Appeals for the Fourth Circuit, filed.

Complaint

(Filed November 7, 1966)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17796

DOMINIC B. ARGUELLES, 411 W. Saratoga Street, Baltimore, Maryland,

Plaintiff,

VS.

U. S. BULK CARRIERS, INC., a body corporate, 17 Battery Place, New York, New York (Serve On: Secretary of State of Maryland),

Defendant.

The Complaint of Dominic B. Arguelles, by I. Duke Avnet and Avnet and Avnet, his attorneys, against U. S. Bulk Carriers, Inc., a body corporate, in a cause of contract, wages, transportation expenses, overtime earnings and damages, civil, admiralty and maritime, alleges as follows:

First: That the Plaintiff is a citizen (or national) of the Philippine Islands, and a resident alien of the United States residing in the City of Baltimore, State of Maryland, and sues in accordance with the provisions of Title 28, Section 1916 of the United States Code Annotated, providing for suits by seamen without prepaying of or bond for costs.

Second: That the Defendant is a body corporate of the State of New York and on the dates mentioned herein was doing business in the Port of Baltimore, State of Maryland.

Third: That this Court has jurisdiction since this is an admiralty and maritime claim (28 U.S.C.A., Sec. 1333; Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 9H).

Fourth: That at all times herein mentioned, the Defendant, U. S. Bulk Carriers, Inc., owned and/or operated, and/or managed, and/or controlled by the merchant vessel, SS *"U. S. Pecos"*.

Fifth: That on or about August 3, 1965, at Galveston, Texas, the Plaintiff signed on shipping articles as Ordinary Seaman on the steamship *"U. S. Pecos"* for a foreign voyage, at wages of $304.90 a month plus subsistence and overtime, for a term not to exceed six months.

Sixth: That pursuant to said shipping articles, the Plaintiff duly entered into the service of said steamship and during the whole time he was on board said vessel, he performed all the terms and conditions of said shipping articles on his part.

Seventh: That the Plaintiff requested to be paid off and discharged in accordance with the said shipping articles on February 3, 1966 but the Defendant, acting through its officers, agents and representatives, failed and refused to do so. That the Plaintiff was not discharged until February 17, 1966 in the Port of Saigon, South Viet Nam, where Plaintiff signed off the said Articles under protest. That the Plaintiff was not paid his wages and earnings until February 22, 1966 in the Port of Galveston, Texas, although he had requested payment as of February 3, 1966 when same was due.

Eighth: That the Plaintiff was entitled to be flown back to Galveston, Texas and to have all of his travelling expenses paid by the Defendant to the city of Galveston, Texas. That the Defendant did fly him back but did not comply with the aforegoing since he was not provided with first class transportation (a discrepancy of $335.50)

and the Defendant failed to pay for his complete luggage costs (a deficiency of $8.50) and for his transportation from the Galveston Airport to the city of Galveston ($6.50).

Ninth: That the Plaintiff requested but the Defendant refused to pay his complete overtime earnings, leaving a balance due him of about $300.00.

Tenth: That the Plaintiff is due two (2) days' pay for each day of delay in the payment of his wages from February 3, 1966 to February 22, 1966, less the first four (4) days, or for a net period of fifteen (15) days, by virtue of the laws of the United States (46 U.S.C.A., Section 596). That the same totals $254.05.

Eleventh: That the Plaintiff has made due demand in the Defendant for all of the aforegoing items but the Defendant has failed and refused to pay same.

Twelfth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the Plaintiff demands damages against the Defendant as follows: (a) for balance due on account of transportation expenses—$350.50; (b) for balance due on account of overtime wages due—$300.00; (c) for penalties on account of delay in payment of his wages—$254.05. That the Plaintiff therefore prays this Honorable Court to award him judgment against the Defendant of a total of $904.55.

I. DUKE AVNET
AVNET AND AVNET
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Answer

(Filed December 20, 1966)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

For its answer to the plaintiff's complaint herein, U. S. Bulk Carriers, Inc., by its attorneys, William J. Little and George W. Sullivan, respectfully states and alleges as follows:

For its answer to the plaintiff's complaint herein, U. S. Bulk Carriers, Inc., by its attorneys, William J. Little and George W. Sullivan, respectfully states and alleges as follows:

First: Defendant lacks sufficient knowledge and information to form a belief as to each and every allegation alleged in paragraphs First and Third of the complaint.

Second: Defendant admits each and every allegation alleged in paragraphs Second, Fourth, Fifth and Sixth of the complaint except that the shipping articles signed by

the plaintiff as alleged in paragraph Fifth of his complaint were subject to termination in accordance with the applicable statutes of the United States and the General Maritime Law as applied in the Courts of the United States and further, defendant denies present knowledge and information as to whether or not plaintiff performed all of the terms and conditions of said shipping articles which were to be performed on his part.

Third: Defendant denies each and every allegation alleged in paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of the complaint.

Fourth: Defendant admits the general admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every other allegation alleged in paragraph Twelfth of the complaint.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT, AND AS A FIRST, SEPARATE, COMPLETE AND DISTINCT DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

Fifth: That the employment by plaintiff aboard defendant's vessel was covered by the "working agreement between various companies and agents (Atlantic & Gulf Coast) and the National Maritime Union of America, an affiliate of the AFL-CIO", which said agreement was entered into by said union with the defendant and that the defendant relied on the terms and provisions of said agreement in the course of its employment of the plaintiff herein and further, the plaintiff's said employment and the shipping articles signed by him are subject to the statutes of the United States and the General Maritime Law as applied in the Courts of the United States and further, the

defendant complied with the terms and provisions of the aforesaid collective bargaining agreement; the laws of the United States and the shipping articles; and, therefore, is not responsible for the payment of the sums claimed by the plaintiff as wages, penalties, transportation differential, miscellaneous expenses, etc., as claimed in the complaint.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT, AND AS A SECOND, SEPARATE, COMPLETE AND DISTINCT DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

Sixth: The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendant, U. S. Bulk Carriers, Inc., respectfully requests this Court enter a judgment in its favor dismissing the plaintiff's complaint, together with the costs and disbursements incurred in the defense of this action and for such other and further relief as the Court may deem the justice of the cause may require.

WILLIAM J. LITTLE and
GEORGE W. SULLIVAN
Attorneys for Defendant
Office and P. O. Address
1513 Fidelity Building
Baltimore, Maryland 21202

Excerpts from Oral Deposition of Plaintiff

(Filed April 26, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Deposition of Dominic B. Arguelles, the plaintiff, taken at 1513 Fidelity Building, Baltimore, Maryland, on December 22, 1966, at 11:00 o'clock a.m., before Myron M. Skolnick, Notary Public.

Appearances:

ALBERT AVNET, Esq., on behalf of Plaintiff.
WILLIAM J. LITTLE, Esq., on behalf of Defendant.

DOMINIC B. ARGUELLES, the plaintiff, called for examination by defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

• • •

Examination by Mr. Little:

(3) Q. Are you a seaman? A. Yes, sir.

Q. And do you have an identification from the Coast Guard? A. Yes, sir.

Q. A Z number? Can you tell us that? A. G number?

Excerpts from Oral Deposition of Plaintiff

Mr. Avnet: Z number.

A. 308194.

Q. How long have you been a seaman? A. Around three years.

Q. In what capacity do you ship? A. Ordinary seaman.

Q. Any other? (4) A. Steward department, or wiper.

Q. Are you a member of the National Maritime Union? A. Yes, sir.

Q. Do you normally ship out of Baltimore? A. Yes, sir.

Q. And did you serve aboard the ship called SS *U.S. Pecos*? A. Yes.

Q. In what capacity, sir? Ordinary seaman.

Q. What kind of a ship was that? A. Liberty ship.

Q. Was this one that had been called back into service? Had it been called back into service from some float, if you know? A. I don't understand that.

Q. When did you sign on the ship? A. February 3, I believe. February 3. I can't remember.

Q. What year? (5) A. '65.

Q. In what port? A. Galveston, Texas.

Q. Were you sent from Baltimore to Galveston to board the ship? A. No, sir, I took the ship there. I was there.

Q. You had been paid off a previous ship there and had been living in Galveston? A. Yes. I was paid off there on another ship.

(6) Mr. Avnet: It's August 3rd he signed out, according to the shipping articles.

Mr. Little: Do you have a copy of the shipping articles?

Mr. Avnet: Yes.

Mr. Little: What is the date of the shipping articles? I don't have one before me.

Mr. Avnet: August 3, 1965.

Excerpts from Oral Deposition of Plaintiff

By Mr. Little:

Q. Mr. Arguelles, your counsel has produced a copy of the shipping articles of the *Pecos,* photostat thereof, and I will ask if you will examine the second page thereof and ask you if that is your name? A. Yes, sir.

Q. And signature? A. Yes, sir.

Q. Now, would those documents and refreshing recollection would you say you signed on on February 3, 1965 or a later date? What date did you sign on? Look at (7) these documents. A. Where is this date here? This one here?

Mr. Avnet: Yes, that is it. That's you right there, right.

A. Yes, sir. Yes, August 3.

Q. 1965? A. Yes, sir.

Q. And the articles recite, do they not, that it is for one or more ports from Galveston, one or more ports in the Mediterranean via bunkering ports as required and it is for a term of six months?

• • •

(9) Q. All right. And from there? A. We went to Keelung, Taiwan.

Q. Did you load or unload cargo there? A. I believe we loaded cargo.

Q. And from there where did you go? A. We went to Kaoshung.

Q. Can you spell that? In what country is it? A. Taiwan.

Q. Taiwan? A. K-a-o-s-h-u-n-g.

Q. Did you unload or load cargo there? A. We loaded cargo.

Q. Very well, and from there? A. We went to Saigon.

Excerpts from Oral Deposition of Plaintiff

Q. Saigon. Do you recall when you arrived at Saigon or allegedly at Saigon? A. I can't recall that unless I look in the book.

(10) Q. How long did you lay at Saigon waiting for discharge? A. Well, in my rough figure—I can't remember.

Q. Well, rough figure? A. Week.

Q. They were a great many ships in port? A. Yes, sir.

Q. And you were waiting your turn I suppose? A. Yes, sir.

Q. Then there was cargo on board for discharge at Saigon? A. Yes, sir.

Q. Or somewhere in that vicinity? A. Over a week, rough figure. Then after we unloaded the cargo we went back to Kaoshung.

Q. Very well, and from there? A. We went to Saigon.

Q. Right. A. We loaded there and went back to Saigon.

Q. This was for cargo for discharge at Saigon? A. Yes, we loaded cargo at Kaoshung and then went back to Saigon again.

Q. I understand. (11) A. We stayed in the Anchorage in Saigon for eleven days.

Q. On your second? A. Yes, sir.

Q. On your return? A. Yes, sir.

Q. Very well, and then what happened? A. And then we asked the Captain to furnish the launch for the crew to go ashore.

Q. When you say we do you mean you or other members of the crew? A. Other members of the crew. The whole crew on the ship. But the Captain refused, there is no ship, no launch I mean.

Q. No launch? A. No launch.

Q. He did not have a launch? A. Well, maybe he can call up the agent or something like that.

Excerpts from Oral Deposition of Plaintiff

Q. All right, I understand. A. We sat there eleven days, so we left the Anchorage (12) up to the river. I believe we stayed there in the river until they discharged the cargo for, well, almost two weeks I believe.

Q. It took a long time? A. A long time.

Q. Very well. Then what happened? A. So well, the article was expired.

Q. Six months articles had run out? A. Yes, sir.

Q. When had they run out? A. Well, they run out when we were in Taiwan.

Q. On the first stop in Taiwan or the second time? A. No, the second time, the second trip.

Q. All right. A. The articles ran out so we went off the ship.

Q. So after your articles ran out you went back to Saigon, you were in the anchorage for eleven days and then you went up river with the cargo and you were still delayed two weeks to be discharged? A. Around that.

(13) Q. When did you request to be discharged? A. In Taiwan, in Kaoshung, when we arrived there.

Q. And you requested to be discharged then? A. Yes, sir.

Q. What date was that? A. I couldn't remember.

Q. Had cargo been loaded at the time you requested discharge? A. I can't remember but I believe they did not load the cargo yet.

Q. Are you saying that the ship was empty of cargo at the time you requested discharge? A. I can't remember that.

Q. Now did you and others request discharge? A. Yes, sir, some of the crew.

Q. Would you say you requested discharge at the time some others did as well? A. The same thing. We all requested to be—to get off the ship.

Q. Very well, and you say that occurred in Taiwan on the second trip? (14) A. Yes, sir.

Excerpts from Oral Deposition of Plaintiff

Q. And you don't know whether it was before or after cargo had been loaded or discharged? A. I can't remember that.

Q. Did you expect to get off at Taiwan or get off somewhere else? A. At Taiwan because we don't want to go back to Saigon any more.

Q. Well, in the 7th paragraph of your complaint it indicates you requested to be paid off and discharged on February 3, 1966, and do you say that that was while the ship was at Taiwan? A. Taiwan, yes, sir.

Q. Do you know whether or not at that time there was cargo still on board for discharge? A. I can't remember that.

Q. Do you know whether there was cargo still on board or cargo that had been loaded for discharge in Saigon? A. I can't remember.

Q. Now then the same paragraph of the complaint indicates that you were discharged on February 17, 1966. (15) Where did that occur? A. In Saigon.

Q. Where? A. In Saigon.

Q. Were you paid off in the presence of the U. S. Consul? A. We were discharged. We didn't get paid off.

Q. All right, and then what happened? A. Well, we requested the Consul that we don't want to get discharged unless we get our money. That is why we got stuck there for half a day and missed the plane, the first plane, the first flight.

Q. Had you made arrangements for flying or did the ship or the U. S. Consul make arrangements for your return? A. Well, I believe the company agent did.

Q. You knew when you were being discharged that some arrangements were being made for air travel back to the States, isn't that correct, sir? A. Yes, sir.

* * *

Excerpts from Oral Deposition of Plaintiff

(19) Q. Now, were there any delays other than at Saigon in your departure for travel to Galveston? A. Yes, we were delayed because we were in the American Consul.

Q. And you had an argument with the Vice-Consul? A. Yes.

Q. And that delayed you a day? A. We were delayed in our first flight and then they took us to the airport.

(20) Q. You say took us. Took you and some other men? A. Yes, sir. They took us to the plane but they held us up. There was a barricade. They held us up there for around two hours so we can't get in, so the agent took us back to town.

Q. There was a military barricade which prevented you from getting into the airport to take off on a flight that was scheduled? A. There was.

Q. So then what happened? A. They took us back to town and put us in the hotel for overnight.

Q. Did they pay your hotel? A. Yes. The next day the agent picked us up and put us in the plane.

Q. Was this delay—this delay had nothing to do with the argument with the Consul or did it? A. Well, yes, because we wanted to get paid. We wanted our money before we get our discharge.

Q. Right. (21) A. We don't want to get discharged without money so until—

Q. Well, did you get your money? A. No, we didn't get paid off.

Q. Then you were provided with some money for food and travel? A. Yes, sir.

Q. And who provided that? A. The Captain.

Q. How much did he provide for you? A. $50, each crew.

Q. And you were given then by the agent the first-class Pan-American ticket all the way through Galveston? A. Yes, sir.

Excerpts from Oral Deposition of Plaintiff

Q. Then when did you actually leave Saigon Airport? A. I can't remember that.

Q. Were you delayed at any other point between Saigon and Galveston? A. No, sir.

• • •

(23) A. You didn't ask me about from Los Angeles I paid my excess luggage to Houston.

By Mr. Little:

Q. Was there an excess luggage charge on the ocean (24) travel? A. Well, that was charged on the luggage, our personal luggage, that would be paid by the company, but when we transferred in the other plane they asked for the excess luggage so I had to pay.

Q. How much did you pay? A. $8.

Q. You say $8.50 in your complaint? A. Or something like that.

Q. Do you have a receipt or stub for that? A. I have the receipt. I don't know if Mr. Avnet got that receipt.

Mr. Little: Off the record.
(Discussion off the record.)

By Mr. Little:

Q. And one of your complaints relates to contested overtime. Do you have some itemization in your records of what overtime you are talking about? A. Yes, sir.

Q. Do you have your records here? A. Yes.

(25) Q. Are you referring to some document? Are you now referring to some document which you prepared? A. I don't understand that.

Q. Did you make this paper? A. I did, yes, sir.

Q. And it's in your handwriting? A. Yes, sir.

Q. May I have a copy made? A. Sure.

Excerpts from Oral Deposition of Plaintiff

Q. I am making copies of the document but before we get into the document, did you have any discussion or beefs with any representative of the Union to take up with the ship or the company about the overtime or any of these other things? A. Yes, I discussed that with the Union.

Q. Where? A. In Galveston.

Q. And was anything done there about this? A. No, sir.

Q. Do you remember was there a patrolman that you talked to? (26) A. The patrolman, yes.

Q. Do you recall his name? A. John Conway.

Q. Did he write? Do you know if he wrote the company about these things? A. I don't know. He said all you got to do is ask information from the patrolman Patterson in Japan, because the ship was still going to the Far East.

Q. Were you going to take the ship back to Japan? A. No.

Q. But Conway told you to take it up with the patrolman in Japan? A. Yes. To write a letter to there, he told me.

Q. Did you do it? A. I didn't yet.

Q. All right. A. The ship was still in the Far East.

Q. Was he suggesting that you write to a representative of the Union who was aboard the ship? A. No, he is the patrolman. He is the patrolman in Yokohama.

(27) Q. I see, but you didn't do that? A. I didn't do that yet because I am waiting for my attorney to discuss.

Q. I understand.

Were your meals provided on the airplanes? A. Yes, sir.

Q. And the only ground transportation cost you had was the $6.50 share of the limousine? A. Yes, sir.

Q. And the excess baggage of $8.50? A. Yes, sir.

Q. Now, it's indicated in your complaint that you received your wages on February 22nd, 1966, is that correct? A. Which?

Excerpts from Oral Deposition of Plaintiff

Q. It is indicated that you received your pay when you got back to the United States? A. Yes, sir.

Q. Did that occur at Galveston? A. Texas.

Q. And did that occur on the 22nd of February? (28) A. 27 was it?

Q. 22nd. A. 22nd, yes.

Q. It appears from your complaint that you were discharged on February 17th and that you were back in Galveston? A. That's right.

Q. Five days later? A. Yes, that's right.

Q. Is that right? A. Yes, sir.

Q. Or you may have arrived a day or two before, is that correct? A. Yes, sir.

Q. How many days were you in Galveston before you were paid? A. I believe that was three days.

Q. Before you were paid? A. Yes, sir.

Q. Were the other men paid at the same time? A. I don't know that.

(29) Q. You weren't with them? A. No.

Q. And you were paid in the office of the U. S. Bulk Carriers or by one of its agents? A. Yes, sir.

Q. Do you recall who, where? A. In Galveston, Texas.

Q. The same place you signed on? A. Yes, sir.

Q. And did you sign a receipt for your money? A. I did.

Q. At that time did you have any discussions with the person who was paying you about this claim for overtime? A. There was no purser in that ship. Chief mate.

Q. No, no, when you were finally paid at Galveston was there any discussion or complaint made by you to the person who was paying you the money that you were entitled to for overtime? A. Yes, I did have the complaint. I said this payroll is not correct because I have some overtime that was (30) disputed. And he said, well, you take it from your Union.

Excerpts from Oral Deposition of Plaintiff

Q. Did you give that person any information about the details of your overtime complaint? A. I did.

Q. In writing? Was it in writing? A. No, not in writing.

Q. Did you have this document that you just looked at a few moments ago at the time? A. No, I didn't have that with me but I explained to him everything.

Q. You prepared that later, is that correct? A. No, it was in my original overtime, I still have it.

Q. You still had copies in your book you mean? A. No, not in my book. The written overtime is just the ship gave us to write our overtime and signed by the mate.

Q. You have those tickets? A. I still have that. I keep that. So all the disputed overtime I rewrite it and that's the one you have a copy.

(31) Q. I see. You mean for every overtime period you have a slip which is signed by the mate? A. Yes, sir, I have.

Q. And for that you have been paid? A. I have been paid the overtime which was not disputed.

Q. Was there any slip prepared by you for signature by the mate and that you presented to the mate for signature in this disputed overtime? A. No, we, the crew, we just write by ourselves and take it to the patrolman as soon as we arrive in port in the States.

Q. Now, I'm going to show you this overtime claim itemization and ask you when you prepared this? When did you make this? A. I made this when I arrived in Baltimore.

Q. When did you arrive in Baltimore? A. February. 23rd of February I believe.

Q. What other documents did you have from which you prepared this? A. That's all.

(32) Q. This is just from your memory? A. Yes, sir. No, no.

Excerpts from Oral Deposition of Plaintiff

Q. This log book you are talking about? A. No, my regular overtime sheets which the mate signed up all our overtime.

Q. Right. A. And then I have this overtime which he disputed.

Q. Did he write disputed on your slip? A. We wrote it ourselves.

Q. On the slip? A. No, on this paper.

Q. But you didn't do that until you came to Baltimore? A. No, sir, but it is in my original. It's in the original paper which he is supposed to sign.

Q. Where are the papers he was originally— A. It's in my room.

Q. And you prepared those? A. I prepared those.

Q. On board the ship? A. Yes, sir.

(33) Q. And you have them now? A. I have them.

Q. Along with the ones he did? A. Yes.

Q. Would you make those available to Mr. Avnet, the ones that he authorized and the ones you say are in dispute? A. Yes, sir.

Mr. Avnet: Both you want?

Mr. Little: Yes, sir. May we have a copy marked for identification, offered, using a facsimile copy?

Mr. Avnet: All right.

(The overtime list referred to above was marked Defendant's Deposition Exhibit No. 1.)

By Mr. Little:

Q. You indicated on your Exhibit No. 1 your overtime claim that you were restricted to the ship since arrival of the vessel in Saigon February 3, 1966? A. Yes, sir.

(34) Q. Was that at the end or not the end but was that— A. The last time.

Excerpts from Oral Deposition of Plaintiff

Q. The last time? A. Yes, sir.

Q. To Saigon? A. Yes, sir.

Q. Now when you were there previously, on the first trip, you were there a week, is that correct, waiting for discharge? A. Yes, sir.

Q. And were you in the anchorage in the harbor? A. No, we anchored inside the river.

Q. In the river? A. Yes, sir.

Q. Were you able to go ashore from that point? A. Yes, because they furnished a launch for the crew.

Q. And that was at a different place? A. Different place in the river.

Q. Closer by where you were going to discharge? (35) A. Yes, sir.

Q. Well, on your second trip you were really not anchored in the harbor of Saigon, were you? A. On the second trip we certainly were anchored in the harbor, outside.

Q. Outside the harbor of Saigon? A. Yes, sir.

Q. And there were many other ships there? A. Yes, sir.

Q. Do you know whether or not there were any naval or military restrictions on the going ashore from where your ship was anchored? A. I don't know that, sir.

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Plaintiff's Overtime List, Marked as Defendant's Exhibit No. 1 for Identification

(See opposite ☛)

Defendant's Exh. 6-F No. 1

VESSEL-SS U.S. Pecos — OVERTIME CLAIM ITEMIZATION — 1965

DOMINIC ARGUELLES -- ORDINARY SEAMAN -- 4-8 WATCH

PORT OR SEA	DAY OF WEEK	MONTH + DATE	DESCRIPTION of WORK DONE + REASONS	TIME FROM	TO	HRS.
Port Said	Sat.	10-9-65	Shifting ship (0-4 Watch)	2:00 PM	MINIMUM	4
Kuching	Tue.	11-30-65	Working in tanker	8:~~30~~ AM	12:00 AM	3½
"	Sat.	12-4-65	Shifting ship	9:00 AM	MIN.	4
"	Wed.	12-8-65	Securing & Unlocking	8:00 AM	12:30 PM	4½
"	Wed.	12-8-65	Meal Hour	—	—	1
"	Wed.	12-8-65	Delayed sailing	9:00 AM	11:00 AM	8
At Sea	Mon.	12-13-65	Securing gear at sea ~ Penalty $10.00			8
Saigon	Mon.	12-20-65	Cargo Watch - No. 5 Hold	4:00 PM	12:00 PM	8
"	Tue.	12-21-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Wed.	12-22-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Thu.	12-23-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Fri.	12-24-65	" " No. 3 "	4:00 PM	12:00 PM	8

Restricted to the ship since the arrival of the Vessel in Saigon Feb. 3, 1966 while the Vessel anchored the harbour. Left the ~~Vessel~~ on charge Feb. 13, 1966. The company refused to furnish launch for the crew. Therefore, We the crew are entitled 8 hours a day for 11 days.

Restricting for 11 days, 8 hrs. a day — 88

Total hrs. — — — — — — — — — — — — — 88

Plus other disputed overtimes above — 59

all together — — — — Total — — — 147

Motion for Summary Judgment

(Filed April 19, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Comes Defendant, U. S. Bulk Carriers, Inc., by William J. Little and George W. Sullivan, its attorneys, and moves for summary judgment, and in support thereof respectfully shows:

1. The claim of $904.65 asserted by the Plaintiff is itemized in the pleadings as:

> (a) for balance due on account of transportation expenses—$350.50; (b) for balance due on account of overtime wages due $300.00; (c) for penalties on account of delay in payment of his wages—$254.05.

2. As to 1(a) above due on account of transportation expenses, it is alleged at paragraph Eighth of the Complaint, that the Plaintiff was entitled to be flown back to Galveston, Texas and to have all his traveling expenses paid by the Defendant to the City of Galveston. That the Defendant did fly him back but did not comply with the foregoing since he was not provided with first class transportation (a discrepancy of $335.50) and the Defendant failed to pay for his complete luggage costs (a deficiency of $8.50) and his transportation from the Galveston Airport to the City of Galveston ($6.50).

In fact, as disclosed by plaintiff in his deposition (not presently filed), the Defendant provided ticket for first class air transportation from Saigon to Galveston (pages 16-17-18 of deposition), plus $50.00 cash for "food and travel" (p. 21 of deposition). All food was provided in the price of the ticket, and no out-of-pocket expense was incurred other than $8.50 for excess baggage and $6.50 for shared limousine from Houston to Galveston (pp. 23-24) Plaintiff's counsel has recently advised that the airline has made an adjustment for its failure to provide first class travel accommodations from Saigon to Continental U. S. A. First class travel was admittedly provided from Los Angeles to Houston (though the ticket provided for travel to Galveston) (p. 17 of deposition). If no adjustment was made as to the "non-flight" from Houston to Galveston, the $50.00 advanced for food and travel more than compensates for the limousine expense of $6.50 and the excess baggage charge by the domestic airline.

3. As to item 1(c) above, for penalties on account of delay in payment of wages—$254.05, it is asserted at paragraphs Seventh and Tenth of the Complaint as follows:

> Seventh: That the Plaintiff requested to be paid off and discharged in accordance with said shipping articles on February 3, 1966 (as asserted in Item Fifth, the articles were for a foreign voyage for a term of six months having been signed at Galveston on August 3, 1965) but the Defendant failed and refused to do so. That the Plaintiff was not discharged until February 17, 1966 in the Port of Saigon, South Viet Nam, where Plaintiff signed off the said articles under protest. That the Plaintiff was not paid his wages and earnings until February 22, 1966 in the Port of Galveston, Texas, although he had requested payment as of February 3, 1966 when same was due.

Tenth: That the Plaintiff is due two (2) days' pay for each day of delay in the payment of his wages from February 3, 1966 to February 22, 1966, less the first four (4) days, or for a net period of fifteen (15) days, by virtue of the laws of the United States (46 U.S.C.A. Section 596). That the same totals $254.05.

The Statute alluded to provides as follows:

> The master or owner of any vessel shall pay to every seaman . . . and in the case of vessels making foreign voyages, . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . .

As disclosed by Plaintiff by deposition, there was a dispute with the U. S. Consul at Saigon on February 17, 1966 (p. 15 of the deposition) "We were discharged. We didn't get paid off. . . . Well, we requested the Consul at Saigon on February 17, 1966 that we don't want to get discharged unless we get our money. That is why we got stuck there for a half a day and missed the plane, the first plane, the first flight".

In fact, the Plaintiff was paid by voucher which he signed in the presence of the Consul and which was honored

by the owners on February 22, 1966 at Galveston, Texas. It was illegal to pay off in "money" demanded by the Plaintiff. See affidavit and exhibits attached. Moreover, the Plaintiff is mistaken in his recollection of where the ship was on February 3, 1967. As disclosed by the attached affidavit and facsimile pages of the log book, the vessel arrived at Cap St. Jacques at 1600 on February 3, 1966 and remained at anchor awaiting clearance and berth at Saigon. Cap St. Jacques is not Saigon, but on the coast and down river from Saigon. Free Practique and Customs Clearance was not authorized at this anchorage. This was not granted until 1530 on February 13, 1966, after the vessel was permitted to move from anchorage off Cap St. Jacques, upstream to Saigon, for discharge of cargo. The vessel was unloaded between February 15 and February 18th. See affidavit and exhibits attached. But for the "beef" with the American Consul, the Plaintiff would have been back in Galveston, in all probability, a day earlier, the 21st—within four days of his discharge. The conditions prevailing in Saigon certainly amounted to "sufficient cause" for handling payment of the wages as indicated.

4. As to item 1(b) above, "for balance due on account of overtime wages—$300.00", Plaintiff submitted at his deposition an itemization ith respect to 147 overtime hours of which 88 are stated therein to be on account of "restriction for 11 days, 8 hrs. a day"—"Restricted to the ship since the arrival of the vessel in Saigon, February 3, 1966 while the vessel anchored (in) the harbor. Left the anchorage February 13, 1966. The company refused to furnish launch for the crew. Therefore, the crew are entitled to 8 hours a day for 11 days". Fifty-nine (59) disputed overtime hours related to October, November and December 1965.

Motion for Summary Judgment

In fact, the vessel did not arrive and anchor in the harbor at Saigon on February 3, 1966. As recited previously, and as reflected in the affidavit and exhibits, the vessel arrived off Cap St. Jacques (also known as Vang Tau) on February 3, 1966 and remained at this anchorage, with sea watches maintained, until the vessel was directed to proceed to Saigon on February 13, 1966, following which it discharged cargo between February 13 and February 18. Free Practique was not granted until February 13, 1966 at Saigon. The Plaintiff was not entitled to be discharged as he claims.

Also, as stated by the Plaintiff on deposition, he was instructed by the NMU port representative at Galveston to contact the Union representative in Japan with respect to his claims, but he did not do so. The "Working Agreement" between the Union and Employer provides for grievance procedure. See attached affidavit. The Plaintiff having failed to exhaust the remedies provided by the "Working Agreement" should not be heard, particularly as there is no evidence of any refusal by the employer to deal with the three claim matters in the manner contemplated by the "Working Agreement", and certainly there is no evidence that the Union has refused to do so. The issue of law involved on this point will be more exhaustively treated on brief.

WILLIAM J. LITTLE
1513 Fidelity Building
Baltimore, Maryland 21201

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

(Filed April 19, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CARL KOSTER, being duly sworn, deposes and says:

That at all the times mentioned in the plaintiff's complaint he performed the duties, among others, as Manager of Marine Personnel for the defendant, U. S. Bulk Carriers, Inc. Said defendant was a Delaware corporation and deponent's knowledge and information of the matters hereinafter set forth were acquired by him in the course of his employment by said corporation.

In his complaint, the plaintiff states that he has not received a balance of $335.50 due him on account of the differential between first class air transportation and tourist class for part of the trip by air from Saigon, South Vietnam to Galveston, Texas. Deponent is informed and believes that subsequent to the commencement of this action plaintiff applied to Pan American World Airways at the suggestion of defendant's counsel and has, as of this date, received the funds claimed in this connection directly from said airline. Therefore, defendant is not obligated to pay the sum of $335.50, as demanded in paragraph eighth of the complaint.

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

In the course of the defense of this action, it has been alleged by the defendant, and admitted by the plaintiff, that he was a member of the National Maritime Union of America, an affiliate of the AFL-CIO. At all the times mentioned in the complaint, there was in existence an agreement between the defendant and said Union covering the plaintiff's employment aboard defendant's vessel. As part of the terms and provisions of the agreement, Article III, entitled "Port Time," Section 1.(c), provides:

> "Port Time Awaiting Clearance at Quarantine, etc. Port time shall not apply while awaiting clearance at quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals."

The defendant's vessel arrived at Cape St. Jacques preparatory to entering the Port of Saigon on February 3, 1966. The vessel was required to enter an anchorage at this location and await clearance to proceed to the Port of Saigon. Pratique and clearance was not authorized at Cape St. Jacques. Pratique was not granted until the vessel entered the Port of Saigon on February 13, 1966. At that time sea watches were broken, non-watch standing crew members were relieved and subsequently cargo discharge was commenced. On February 17, 1966 plaintiff, along with other crew members, was signed for ship articles and paid off by voucher before the U. S. Consul at Saigon. Transportation was provided for the return of the plaintiff to the United States. Attached hereto, and made a part hereof, are photocopies of pages from the deck log of SS *US Pecos* describing these events.

When the plaintiff obtained employment aboard defendant's vessel, he signed six months' shipping articles commencing on August 3, 1965. At the time said articles were scheduled to expire, the vessel was at the anchorage

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

at Cape St. Jacques awaiting clearance to enter the Port of Saigon. The cargo in the vessel had been loaded prior to February 3, 1966, and articles therefor were automatically extended until the cargo in the vessel was completely discharged. Said cargo was completely discharged at Saigon on February 18, 1966. It is provided by Title 46, U.S.C., Section 596, as referred to in plaintiff's complaint, that the defendant had up to and including 24 hours after the cargo had been discharged, or within four days after the plaintiff had been discharged, whichever event occurred first, to effect the plaintiff's pay-off. The pay-off was effected by voucher before the U. S. Consul at Saigon 24 hours before the completion of the discharge of the cargo at that Port. Attached hereto, and made part hereof, is a photocopy of the voucher used to effect the pay-off at that time.

Because of local currency restrictions, U. S. dollars were not distributed to the plaintiff at Saigon in an amount greater than that deemed necessary to meet any local expenses. A copy of the pay-off voucher issued to the plaintiff at Saigon, which enabled him to collect the balance of his wages due at Galveston, is attached hereto and made a part hereof. It is submitted that the penalties claimed by the plaintiff are not applicable. Inasmuch as the defendant acted in accordance with the terms and provisions of the union agreement; local rules and regulations; the provisions of the statutes of the United States and the laws of South Vietnam; no penalties have accrued to the plaintiff as alleged.

As part of the plaintiff's claims herein, he states that he was not paid all of his overtime earnings that were due him upon the termination of his employment aboard defendant's vessel. He claims that a sum approximating $300 is presently due and collectible. The plaintiff admitted in his examination before trial that he discussed

this matter with a Mr. Conway at Galveston and Mr. Conway, a representative of the National Maritime Union, referred him to the Union Port Agent in Yokohama, Japan. Mr. Conway apparently informed the plaintiff he should write to Mr. Patterson, the Agent at Yokohama, and request his review of the matter. The plaintiff admitted in his deposition that he did not pursue any aspect of this matter with Mr. Patterson. Disputed overtime, restriction to ship, and delayed pay-off complaints all represent matters which are intended to be resolved in accordance with Article II, "Grievances," Sections 1, 2 and 3, which provide as follows:

> "Section 1. Department Spokesmen. The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:
>
> First—Presentation of the complaint to his immediate superior.
>
> Second—Appeal to the head of the department in which the employee involved shall be employed.
>
> Third—Appeal directly to the Master.
>
> "Section 2. Grievance Machinery. If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such

complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

"Section 3. Authority of Master. It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer."

It is also provided that such matters may be submitted to arbitration if an amicable and satisfactory adjustment cannot be made. The arbitration provisions are set forth

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

in the Union agreement as Article XII, Sections 1, 2 and 3. These provisions are rather lengthy and are not set forth verbatim herein but they provide, among other things, for a prompt reference of disputes to an impartial arbitrator designated in the agreement.

In this case the plaintiff has not complied with the agreement between his Union and the defendant, and seeks to proceed independently in this cause in abrogation of the working agreement covering his employment aboard defendant's vessel. It is submitted, therefore, that this action should be dismissed in its entirety and the plaintiff relegated to the grievance machinery and, if necessary, the arbitration procedure established in his behalf by his collective bargaining agent, The National Maritime Union. While it should be apparent on its face that the facts do not support the plaintiff's contentions, he, nevertheless, must seek his alleged relief by resort to the machinery established for this purpose between the defendant and The National Maritime Union.

WHEREFORE, the defendant's motion for summary judgment should be granted.

S/ CARL KOSTER

Sworn to before me this
18th day of April, 1967

FRANCIS R. MATERA
Notary Public, State of New York
No. 24-7758320
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1968

Attachments

(See opposite ☛)

Plaintiff's Answer to Defendant's Motion for Summary Judgment

(Filed April 25, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

NOW COMES DOMINIC B. ARGUELLES, Plaintiff, by I. Duke Avnet and Avnet and Avnet, his attorneys, and opposes the move for Summary Judgment and in support thereof, says:

1. That there are numerous issues of material facts which cannot be resolved on a motion for summary judgment.

2. That the affidavit made by Carl Koster to support the Motion for Summary Judgment is not viable and sound because he is not competent to testify to the matters therein. That Mr. Koster is manager of marine personnel for the defendant and had no actual contact with the events related in the Complaint and was not, according to plaintiff's information and belief, on the said vessel at the time of the incidents alleged, nor was he in Taiwan and South Vietnam when the incidents occurred.

3. That in response to paragraph 2 of the Motion, the plaintiff admits that subsequent to the filing of the suit, he did receive the sum of $342.00 from Pan-American World Airways, Inc., as a refund on account of the difference between first class transportation provided for the plaintiff and economy transportation services which he actually received. That the $50.00 advanced for food and

travel was, upon information and belief, not included in the aforementioned refund.

That, therefore, the plaintiff withdraws his claim for transporation expenses referred to in the eighth paragraph of his Complaint but renews his claim for the luggage costs of $8.50 and for bus transportation from Galveston Airport to the City of Galveston in the amount of $6.50.

4. That with respect to paragraph 3 of the said Motion, the plaintiff asserts that he was entitled to be paid in American dollars when he was discharged in a foreign port, and that he made such demand but same was refused. Further answering the said paragraph, the plaintiff asserts that, according to his information and belief, the plaintiff was never notified that pratique had been denied and that the custom and immigration officials had denied him and other crew members shore leave at Cape St. Jaques, South Vietnam; nor is there any affirmative evidence thereof except an entry made by the master in the log.

Further answering, the plaintiff was never notified in Saigon that it was illegal to pay him in American dollars; and there was no proof presented of same, except defendant's statement in these pleadings.

Further, the terms of the working agreement between the National Maritime Union of America and the defendant were not complied with, with respect to proof of government restriction against shore leave for the plaintiff and the crew.

Finally, the plaintiff requested, while in Taiwan and just a few days before the expiration of the Articles, that he be paid off and discharged from the Articles, and when this was refused, that he be paid the maximum draw to which he was entitled, but this too was refused by the master; that accordingly, he was entitled to be paid off and discharged from the Articles while in Taiwan, *46 U.S.C.A., Sec. 597.*

Plaintiff's Answer to Defendant's Motion for Summary Judgment

5. As to paragraph 4 of the Motion, plaintiff asserts that with respect to the overtime items which he is claiming, which occurred before the vessel arrived in Saigon, plaintiff is entitled to be paid promptly and does not have to wait until any negotiations between the union and the defendant, particularly in view of the fact that the plaintiff made demand for the overtime pay upon his being paid off in Galveston, Texas, and requested the union representative to represent him in the matter and was put off by the union representative and by the company in respect to such request. (The union-management agreement will be furnished the Court for the hearing.)

6. As to overtime hours claimed while restricted to the vessel at Cape St. Jaques, plaintiff reiterates and incorporates the reasons expressed in paragraph 5 hereof for payment of same promptly without union-management negotiation. Besides, it is submitted that the defendant did not comply with the requirements of the union contract as aforementioned to explain the restriction aboard ship and so plaintiff is entitled to this overtime pay; and that the defendant has not proven through the Motion and its Affidavit that there was any legal justification for such restriction.

I. Duke Avnet
Avnet and Avnet
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

(Filed April 25, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

STATE OF MARYLAND }
CITY OF BALTIMORE } ss.:

DOMINIC B. ARGUELLES, being duly sworn, deposes and says:

That he is the plaintiff in the above-entitled case and served on the S.S. "*U.S. Pecos*" as ordinary seaman from about August 3, 1965 to about February 17, 1966.

That since the filing of the Bill of Complaint, he has received from Pan-American World Airways, Inc. the sum of $342.00, representing the difference between the value of tourist passage and first class passage on the Pan-American plane on which he was repatriated in this case.

That he has not yet been reimbursed for the luggage costs, a deficiency of $8.50, and for his transportation from Galveston Airport to the City of Galveston of $6.50. To the best of his recollection, the $50.00 advance that was given to him in Saigon, just previous to his being repatriated, was deducted from monies due him when he was paid off in Galveston about February 22, 1966; however, he has no written record to support this statement.

That when the vessel was in Taiwan, preparatory to leaving for Saigon, just before the expiration of the Shipping Articles, the plaintiff asked the captain of the vessel

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

to be paid off and to be discharged from the Articles and failing this, to be paid the maximum that he would be entitled to as a draw. That the master refused to pay him off and to discharge him from the Articles and refused to pay him the maximum to which he was entitled to for a draw. That upon information and belief, this entitled the plaintiff to be paid off completely and to be discharged from the Articles while the vessel was still in Taiwan.

That upon the vessel arriving in Cape St. Jaques in South Vietnam, about February 3, 1966, the plaintiff again asked to be paid off and to be discharged from the Articles because the Shipping Articles had expired, and the captain refused. Further, plaintiff asked for shore leave and the captain refused him and other members of the crew who asked for shore leave. Upon information and belief, the captain did not offer any explanation for refusing them shore leave. That the plaintiff was not notified by the captain or by any of the officers or by any of the foreign authorities in South Vietnam that pratique had been denied.

That upon the arrival in the harbor of Saigon about February 13, 1966, plaintiff again asked to be paid off and be discharged but the captain still refused to do this.

That about February 17, 1966, he was offered his discharge from the Articles but the captain refused to pay him the balance of wages due him in American dollars and stead, gave him a voucher for such payment in the States, and gave him a draw of $50.00 in cash just preparatory to being flown back to the States. That the plaintiff protested and signed off under protest. That the plaintiff was not notified until now that it was illegal to pay the men off in American dollars.

That on the basis of the figures prepared by the plaintiff, he is entitled to overtime pay in the amount of $300.00, the same being made up as follows:

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

$59.00 of overtime for overtime work performed prior to February 3, 1966 and $88.00 of overtime on account of being restricted to the vessel for 11 days (estimated at $8.00 per day) while the vessel was in South Vietnam and before the plaintiff was granted shore leave. The itemization of the specific hours of overtime requested, particularly with regard to the aforementioned $59.00 overtime hour period, has been furnished to the defendant.

That he did approach his union representative in the Port of Galveston, Texas, to obtain the aforementioned monies due him, including overtime, and he made such approach about February 22, 1966 when he received his pay, but the said representative for the National Maritime Union did not obtain these payments for him and he was notified by such representative that he would have to look to the union patrolman in Japan to obtain such monies. Because this was a futile and impractical suggestion, in that the plaintiff could not confer and supply details and negotiate at such a long distance, the plaintiff then took the matter up with his present attorneys. That at no time did the defendant offer to pay any of these monies to the plaintiff, although same was requested of it by the plaintiff at the time of his said pay off and subsequently by his attorneys.

WHEREFORE, the plaintiff requests that the Motion for Summary Judgment be denied.

DOMINIC B. ARGUELLES

Subscribed and sworn to before me,
this 24th day of April, 1967.

LEAH PASENKER
Notary Public

Stipulation of Counsel with Respect to Shipping Articles

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 284

U. S. BULK CARRIERS, INC.,

Petitioners,

vs.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

It is hereby stipulated and agreed by counsel for the respective parties involved in this appeal that respondent, Dominic Arguelles, signed Shipping Articles in the form and style as required by Title 46 U.S.C., Section 713 as incident to his employment aboard *SS Pecos,* on August 3, 1965, at Galveston, Texas, for a voyage from the Port of Galveston, Texas to one or more Ports in the Mediterranean via Bunkering Ports, as required, and such other ports and places in any part of the world as the Master may direct, and back to final port of discharge in the continental United States, for a term of time not exceeding six calendar months.

It is further stipulated and agreed that said Shipping Articles contained an undertaking by the Master of the

subject vessel to pay to the crew, as wages, the sums against their names respectively expressed therein (specifically for Dominic Arguelles, $304.90 per month). In addition, the Articles by specific reference stated certain requirements of the law of the United States, including, but not limited to, Title 46 U.S.C. 597, and Title 46 U.S.C. 682.

Dated: New York, New York
July 10, 1970

GEORGE W. SULLIVAN
Counsel for Petitioner

I. DUKE AVNET
Counsel for Respondent

Relevant Portions of Collective Bargaining Agreement

ARTICLE I

GENERAL WORKING RULES

Deck and Engine Department personnel shall be maintained if the vessel is laid up in a United States port for a period of ten (10) days or less.

When it is expected that said freight or passenger vessel will be idle for a period in excess of ten (10) days, the Unlicensed Personnel required to be maintained under this section may be reduced on arrival. If the vessel resumes service within ten (10) days such vessel's Unlicensed Personnel who are entitled and do return to the vessel for the subsequent voyage shall receive wages and subsistence for the period for which they were laid off. Personnel maintained on board pursuant to this section who do not report for duty and do not perform port work

shall not be paid while absent. (Complement of Stewards' Department on passenger vessels in port is subject to the provisions of Article IX, Section 24, "Port Payroll.")

SECTION 39. *Pay-Off Procedure.* Unlicensed seamen who are dismissed or their employment terminated by the Company shall be paid all wages due them as follows:

(a) If the vessel arrives on or before 12 noon and the seaman is dismissed or employment terminated by the Company that day he shall be paid such wages on that date.

(b) If the vessel arrives after 12 noon the seaman shall be paid such wages not later than 12 noon of the day following dismissal or termination of employment by the Company.

(c) If the seaman is dismissed or employment terminated by the Company while on port payroll he shall be paid on the day of dismissal.

If the above is not complied with, a seaman shall receive wages (and board and lodging unless same have been provided by the Company) until and including day of pay-off, but only if such seaman has presented himself at the designated time and place of his pay-off.

ARTICLE II

GRIEVANCES

SECTION 1. *Department Spokesmen.* The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor

to have said grievance adjusted by his respective designated spokeman, in the following manner:

First—Presentation of the complaint to his immediate superior.

Second—Appeal to the head of the department in which the employee involved shall be employed.

Third—Appeal directly to the Master.

SECTION 2. *Grievance Machinery.* If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

SECTION 3. *Authority of Master.* It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer.

Union meetings on board ship are not a valid reason for a man to leave his station unless released by proper authority, and discharge for such unauthorized leaving of post is justified.

ARTICLE III

PORT TIME

SECTION 1. (a) *Commencement of Port Time.* A vessel shall be deemed to have arrived in port thirty (30) minutes after it has anchored or moored at or in the vicinity of a port (or other place of loading or discharging) for the purpose of loading or discharging cargo, ballast, passengers, or mail; undergoing repairs; taking on fuel, water, or stores; fumigation; lay-up; awaiting orders or berth. This provision shall not apply to emergency anchorage or mooring solely for reasons of safety. It is understood that a vessel is moored when all the lines are out and made fast on the bitts, not just the two lines to put it in position, with the ends coiled down on deck, and all gear necessary for tying up stowed away.

(b) *Termination of Port Time.* A vessel shall be deemed to have departed and port time terminated thirty (30) minutes prior to the time when mooring lines are cast off or anchor is aweigh for the purpose of putting to sea directly.

(c) *Port Time Awaiting Clearance at Quarantine, etc.* Port time shall not apply while awaiting clearance at

quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals.

(d) *Application of Port Time.* The foregoing definitions of port time and arrival and departure shall apply to all Unlicensed Personnel in all departments covered by this contract.

SECTION 2. *Restriction to Ship.* Overtime shall be paid to all unlicensed crew members for all hours during which they are required to remain aboard the vessel by federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports for purposes of vessel security or for the standing of safety watches from 12:01 A.M. Saturday until 8 A.M. Monday morning and on holidays except, however, no overtime shall be paid crew members when required to remain aboard only because of orders or regulations of federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports preventing shore leave.

Under the above circumstances the Company shall produce a copy of the government restriction order when the crew is paid off. If it is not possible to get a copy of such restriction order, the Master will prepare a letter stating the terms of restriction for presentation to either the agent of the government or military, and if such agent acknowledges receipt of such letter, this will be ample proof of such restriction. It is incumbent upon the Master to show the delegate a copy of such letter. A letter from the Company's agent or the unsupported statement of the Master will not suffice.

No overtime shall be paid crew members in situations where the safety of the crew requires restriction to the ship (because of heavy seas or winds, etc.) but the Master's denial of shore leave must be supported by clear and re-

liable evidence as to port conditions, such as regular log entries, and such action must be necessary for the health and/or safety of the crew. Under Disputes Board Decision, Case No. 47, DB 127, overtime for restriction to ship was paid because the facts did not meet the foregoing principle.

SECTION 3. *Medical Exemptions.* Port overtime provisions shall not apply to vessels mooring or anchoring for sole purpose of landing sick or injured persons or for other medical reasons.

ARTICLE IV

OVERTIME

SECTION 1. *Overtime Rates.* (a) The overtime rate of pay for members of the Unlicensed Personnel receiving a basic monthly wage of $380.13 or below shall be $1.89 per hour.

(b) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $387.61 or above, but not in excess of $442.45, shall be $2.42 per hour.

(c) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthlty wage of $450.95 or above shall be $2.47 per hour. (Effective June 16, 1962.)

SECTION 2. *Authorization for Overtime Work.* Overtime shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master.

SECTION 3. *Saturdays, Sundays, and Holidays at Sea or in Port.* All work performed at sea or in port on Satur-

days, Sundays, and holidays is overtime except as provided in Article I, Section 12, "Emergency Duties".

When a holiday at sea or in port occurs on Saturday or Sunday, the following Monday shall be deemed a holiday and overtime paid for all required to work. No double overtime shall be paid for work performed on holidays falling on Saturdays or Sundays and day workers shall not receive overtime pay unless required to work.

SECTION 4. *Commencement of Overtime.* Overtime shall commence at the time any employee shall be called to report for work outside of his regular schedule provided such member reports for duty within fifteen (15) minutes. Overtime shall commence for members of the Deck Department on Class A and larger passenger vessels and Class B passenger vessels (including the SS *Santa Rosa* and SS *Santa Paula*) at the time they are called to report for work outside of their regular schedule provided such Deck Department personnel report for duty within thirty (30) minutes on Class A and larger passenger vessels and within twenty (20) minutes on Class B passenger vessels. Otherwise overtime shall commence at the actual time such employee reports for duty and such overtime shall continue until the employee is released. (Effective July 16, 1962.)

SECTION 5. *Computation of Overtime.* Where overtime worked is less than one (1) hour, overtime for one (1) full hour shall be paid. Where overtime work exceeds one hour the overtime work performed shall be paid for in one-half hour periods and a fractional part of such period shall count as one-half hour.

SECTION 6. *Continuous Overtime.* When working overtime and crew is knocked off for two (2) hours or less, the overtime shall be paid straight through, except as otherwise specified in this agreement. Time allowed for meals shall not be considered as overtime in this clause.

Relevant Portions of Collective Bargaining Agreement

SECTION 7. *Checking Overtime.* After overtime has been worked, the senior officer of the department on board will present to each employee who has worked overtime a slip stating hours of overtime and nature of work performed. A permanent record will be kept to conform with individual slips for settlement of overtime.

In the event a question arises as to whether work performed under proper direction is payable as overtime, or if claimed overtime is not paid for, the department head rejecting or disputing the overtime shall note on the crew member's slip the reason for non-approval, or the Company shall at the time of pay-off furnish a slip showing the overtime hours rejected and the reason for the rejection.

Members of the Unlicensed Personnel must submit all overtime claims to department heads prior to termination of voyages. Except in cases where a member of the crew is prevented by some cause beyond his control, no overtime will be considered unless presented within fifteen (15) days after pay-off.

SECTION 8. *Emergency Drills, etc.* No overtime shall be paid for work in connection with drills, inspections, or examinations required by law or emergency work required for the safety of the passengers, crew, vessel, cargo, or another vessel in distress. This clause shall not apply to annual inspection of the vessel. This section, however, is without prejudice to any rights of salvage which the Unlicensed Personnel may have.

SECTION 9. *Payment of Overtime.* All money due crew for overtime work shall be paid at the time of signing off or in any event not more than twenty-four (24) hours after the completion of the voyage.

SECTION 10. *International Date Line.* If a vessel crosses the International Date Line from east to west, and a Saturday, Sunday or holiday is lost, all day workers shall observe the following Monday or the day following a holiday. Watchstanders will be paid overtime in accordance with the principle of Saturday and Sunday overtime at sea. If the Sunday which is lost is also a holiday, or if the following Monday is a holiday, then the following Monday and Tuesday shall be observed.

However, in crossing the International Date Line from west to east, if an extra Saturday, Sunday, or holiday is picked up, only one of such Saturdays, Sundays, or holidays shall be observed and all crew members will be required to work without overtime on the so-called second Saturday, Sunday, or holiday, provided that if Sunday is also a holiday the Sunday which is picked up shall be observed as such holiday.

ARTICLE XII

ARBITRATION

SECTION 1. *Settlement of Disputes Prior to Arbitration.* In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

(a) Notwithstanding any of the foregoing any party to a dispute or grievance may waive the grievance and arbi-

tration provisions referred to above whenever a violation of Article I, Section 2 and/or 3 of this agreement shall be alleged. In such event, such dispute or grievance shall be asserted by notice in writing by registered mail or by telegram, return receipt requested, given to the other party. A copy of such notice shall be sent simultaneously to Theodore W. Kheel, the permanent arbitrator under this agreement. Said arbitrator or his designee shall hold an arbitration hearing as expeditiously as possible but in no event later than 24 hours after receipt of said notice. The award of the arbitrator shall issue forthwith and in no event later than 3 hours after the conclusion of the hearing unless the grieving party agrees to waive this limitation with respect to all or part of the relief requested.

(b) The award of the arbitrator shall be in writing and may be issued with or without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with and enforcement of the award.

(c) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(d) The arbitrator shall serve for the duration of the collective bargaining contract unless either party thirty days prior to the semi-annual anniversary date of his appointment requests his removal in writing by notice to the other party and to the arbitrator. In such event or in the event the arbitrator should resign or for other reasons be unable to perform his duties, his successors shall be appointed by the United States Secretary of Labor. Notwithstanding the request for removal or his resignation the incumbent arbitrator shall continue to serve until his successor has been appointed.

Relevant Portions of Collective Bargaining Agreement

SECTION 2. *Arbitration.* A permanent Disputes Board shall be established. This Board shall consist of six (6) members, three (3) of whom shall be appointed by the Union and three (3) by the American Merchant Marine Institute. Substitutes may be appointed at any time upon notice from either party to the other. On alternate months the representatives of the Union and the American Merchant Marine Institute on this Board will select a man from their respective group to act as Chairman, who shall serve in this capacity for such monthly period.

Upon written notice by either the Company or the Union that any dispute cannot be adjusted by their respective representatives, such dispute shall be referred for final adjustment to the Board. The Board shall meet monthly on a fixed date to be designated by the parties. If there are no disputes to be adjusted at any monthly meeting, the meeting may be cancelled by either party on written notice seventy-two (72) hours prior to the scheduled date of such meeting. In the event a majority of the Board cannot resolve a dispute, it shall be referred, upon the request of either party, to Theodore W. Kheel, the permanent arbitrator under this agreement, his designee or successor, for final decision.

All decisions of the Board and the arbitrator shall be transmitted in writing to all Companies signatory to the agreement and to the Union for uniform application by all parties concerned.

The American Merchant Marine Institute and the Union shall bear the expenses of their respective appointees to the Board, but shall bear equally the expenses of the permanent arbitrator.

SECTION 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant

Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request the dispute or grievance be referred to arbitration as follows:

(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as provided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration.

(b) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(c) Nothing herein shall affect the procedure agreed upon for the resolution of alleged violations of Sections 2 and 3 of Article I of the contract.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

(Filed May 3, 1967)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Baltimore, Maryland
Wednesday, April 26, 1967

Before the Honorable ALEXANDER HARVEY, II, U. S. District Judge, at 10 a.m.

Appearances:

I. DUKE AVNET, Esq.,
Attorney for Plaintiff.

GEORGE W. SULLIVAN, Esq.,
WILLIAM J. LITTLE, Esq.,
Attorneys for Defendant.

RULING OF THE COURT

The Court: This matter arises on the defendant's motion for summary judgment, with attached affidavit and copies of certain exhibits, including the deck log of the ship.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The plaintiff has filed an answer to the motion, together with an affidavit and memoranda of law.

The agreement, NMU Agreement, has been introduced in evidence as Joint Exhibit Number 1.

The deposition of the plaintiff has been filed.

The Court feels that this case should be controlled by the general principles of Maddox—that is, Republic Steel Corporation versus Maddox, 379 U. S. 650—and the more recent decision of the Supreme Court in Vaca versus Sipes, a decision handed down on February 27, 1967, reported in 35 Law Week 4213 and also the more recent decision of Judge Northrop in Brown versus Truck Drivers, Local Union Number 355, in this Court, the opinion being filed March 8, 1967. I don't have a published reference for that opinion. That is Number 17858 in this Court.

I think this case in particular shows the importance of having grievance machinery to deal with problems of this sort. Here we have a claim of some $500 which is being submitted to the Federal Court. It is the net claim after the deduction of what has been admittedly received for air fare, and the Court is asked to decide questions involving overtime and payment of a statutory penalty.

The Court finds that the issues here do amount to a dispute under the Union Agreement both as to the overtime and as to the statutory penalty.

The Court further finds that the evidence does not disclose that the plaintiff took proper or sufficient steps in processing his grievance pursuant to the grievance procedure that was set up. He did not even write a letter to the union representative. He talked to a union representative in Texas and then apparently decided to take the matter into Federal Court.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today.

The Court expresses no view as to the merits of the claim but does hold that the claim must be processed in accordance with procedures established in the Agreement.

Therefore, the motion for summary judgment will be granted; and I will ask counsel for the defendant to prepare and submit an order showing it to Mr. Avnet.

(Thereupon, at 11:00 a.m., the aforecaptioned proceedings were concluded.)

Order of United States District Judge Harvey, Granting Defendant's Motion for Summary Judgment

(Filed May 5, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

This action came on for hearing April 26, 1967, on Defendant's Motion for Summary Judgment, before the Court, Honorable Alexander Harvey II, presiding, and upon consideration thereof, including affidavits in support and in opposition, the deposition of Plaintiff, and the jointly sponsored exhibit (the "working Agreement" between the De-

fendant and the National Maritime Union), and counsel having been heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, that Defendant's Motion for Summary Judgment be and is granted, with Court costs to be paid by the plaintiff.

Dated at Baltimore, Maryland, this 5th day of May, 1967.

S/ ALEXANDER HARVEY, II
Judge

Order of Appeal

(Filed June 1, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

MR. CLERK:

Please enter an appeal to the United States Court of Appeals for the Fourth Circuit from the judgment entered in the above-entitled case on the 5th day of May, 1967.

I. DUKE AVNET
AVNET AND AVNET
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Opinion of the Court of Appeals

(Filed April 4, 1969)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES, Appellant,

versus

U. S. BULK CARRIERS, a body corporate, Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, ALEXANDER HARVEY, II, District Judge.

(Argued January 12, 1968. Decided April 4, 1969)

Before HAYNESWORTH, Chief Judge, BOREMAN and BRYAN, Circuit Judges.

I, DUKE AVNET (AVNET and AVNET on brief) for Appellant, and GEORGE W. SULLIVAN (WILLIAM J. LITTLE on brief) for Appellee.

BOREMAN, *Circuit Judge*:

This suit was brought by Dominic B. Arguelles, a merchant seaman, for wages, including earned overtime, reimbursements, and statutory penalties for delay in payment of wages, all allegedly due from the defendant, U. S. Bulk Carriers, his employer. Jurisdiction is asserted under 28 U.S.C.A. § 1333, the case involving admiralty and maritime claims. Defendant's motion for summary judgment

was granted for the reason that the seaman had not used the grievance machinery and procedure provided by a collective bargaining agreement between his labor union and his employer. From the order granting summary judgment plaintiff appeals. We reverse.

The plaintiff, a merchant seaman and a citizen of the Philippine Islands, has been a resident of Baltimore, Maryland, for a number of years. He joined the American merchant vessel, S/S *"U.S. Pecos,"* at Galveston, Texas, on August 3, 1965, as ordinary seaman on six month articles of employment at the agreed monthly wage of $304.90. Six months later, on February 3, 1966, the vessel, with cargo to be discharged at Saigon, South Vietnam, arrived off Cape St. Jacques where it remained at anchor until February 13, 1966. This delay was admittedly due to the fact that there were several other vessels awaiting their turns to discharge cargo ahead of the *Pecos.* On February 13, 1966, with pilot and customs officer aboard, the vessel proceeded from its anchorage and arrived some six and one-half hours later at designated Buoy No. 13 in the Port of Saigon. The plaintiff, however, claims that he was entitled to be discharged and put ashore on February 3, 1966, and to be paid within four days thereafter.

The vessel's Deck Log was before the court as an exhibit filed with the defendant's affidavit in support of its motion for summary judgment. This log shows an entry on February 3, 1966, as follows: "Free pratique and custom clearance not authorized at this anchorage." The log further shows that the vessel was granted pratique and clearance on February 13, 1966, after the vessel was secured to Buoy No. 13 in the Port of Saigon. In his deposition plaintiff stated that on another occasion within his six month period of service when the vessel was at anchor at a point near the anchorage of February 3, he was granted

shore leave and transportation ashore was provided by the ship.

Before and from the time of arrival at anchorage off Cape St. Jacques, and until arrival in the Port of Saigon, sea watches were constantly maintained. These watches were broken on February 13 *in* the Port of Saigon. While at anchorage off Cape St. Jacques frequent anchor bearings were taken each day. Unloading of cargo commenced in the Port of Saigon on February 16, 1966. Discharging of approximately 350 tons of cargo was concluded on February 18, 1966.

The Deck Log for February 17, 1966, reflects an entry indicating that plaintiff and certain other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate. The Deck Log for February 18, 1966, shows an entry indicating that other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate.

It is undisputed that plaintiff was given a voucher in the presence of the U. S. Consul at Saigon, calling for payment at Galveston, Texas, of all of his agreed basic monthly salary then due at the rate of $304.90, and that the master of the *Pecos* gave to plaintiff and each repatriated crewman the sum of $50.00 in American money for food and miscellaneous travel expense en route to the U.S.A. Plaintiff was provided also with a ticket calling for first class air travel and accommodations from Saigon to Galveston, Texas.

In his deposition plaintiff explained that his departure with his companions from Saigon was delayed from February 17 until the following day, February 18, because they had an argument with the U. S. Consul over their demand for payment in U. S. dollars rather than by voucher. As a consequence plaintiff missed his flight on February 17,

could not get first class air transportation on the following day and traveled second or "tourist class" from Saigon to Los Angeles, California. However, from Los Angeles to Houston, Texas, he traveled first class by air. Instead of flying on to Galveston, as his ticket provided, plaintiff, with companions, elected to go by limousine from Houston to Galveston, his share of the cost being $6.50. Four days later, on February 22, 1966, plaintiff presented himself at the office of Bulk Carriers in Galveston and was paid the amount specified in the voucher presented to him at Saigon. There is nothing in the record to support the plaintiff's claim in his brief that, through fault of the defendant, he had to wait a few days in Galveston before he was paid off there on February 22, 1966.

Plaintiff initially sought judgment for the following:

(1) A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by Bulk Carriers and the cost of less expensive air transport accommodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston.

(2) Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $88.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam.

(3) *Statutory penalty* of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3,

1966, to February 22, 1966, less the first four days, or for a net period of fifteen days.[1]

During the course of proceedings it was suggested to e plaintiff that he could obtain an adjustment directly om the air carrier of the difference between the cost of rst class air travel and the cost of less expensive accommo- ation. Acting upon this suggestion the plaintiff obtained ich adjustment and this claim was abandoned. In argu- ent counsel for the plaintiff referred to the items of $8.50 or excess baggage charge and $6.50 for limousine expense s "minor items" of little importance. In any event, there s no explanation which would show any necessity for the imousine expense from Houston to Galveston since plain- iff's airline ticket admittedly covered transportation be- tween those points. The $50.00 in cash for miscellaneous travel expense would more than cover the excess baggage item of $8.50. Thus, all that remained of the original claims were the claims for overtime earnings [2] and the statutory penalty for delayed payments as provided in 46 U.S.C. § 596.

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[1] Title 46 U.S.C. § 596 provides, in pertinent part, that the master or owner of any vessel making foreign voyages shall pay to every seaman his wages within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner prescribed *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable *"as wages in any claim made before the court."* (Emphasis added.)

[2] Overtime pay is embraced within the meaning of "wages." See *Monteiro* v. *Sociedad Maritima San Nicolas S.A.*, 280 F.2d 568, 573 (2 Cir. 1960); Norris "The Law of Seamen," Vol. I, sec. 47, pp. 76, 77.

It appears that there were two factual issues to be resolved: (1) Whether the plaintiff was entitled to overtime compensation during his period of service aboard ship prior and subsequent to February 3, 1966; (2) whether the master's delay of fifteen days after February 3, 1966, in the payment of plaintiff's wages was "without sufficient cause" within the meaning of § 596.

As hereinbefore shown Arguelles signed six months' shipping articles commencing August 3, 1965. When the *Pecos* was anchored at Cape St. Jacques and awaiting instructions to proceed to Buoy 13 in the Port of Saigon it was carrying cargo which had been loaded prior to February 3, 1966. In the affidavit filed with defendant's motion for summary judgment affiant describes himself as Manager of Marine Personnel for the defendant, Bulk Carriers, and states only that his knowledge and information of the matters set forth "were acquired by him in the course of his employment by said corporation"; he then states in the affidavit that, since the cargo had been loaded within the six-month period prior to February 3, 1966, the shipping articles were automatically extended until the cargo was completely discharged. The articles are not filed with the affidavit and do not appear in the record. Rule 56(e) F.R. Civ.P. provides that such an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." An affidavit based upon information acquired by affiant in the course of his employment as Manager of Marine Personnel, without more, would not meet even the minimum requirements of Rule 56(e). The sufficiency of this affidavit was challenged in plaintiff's answer to the motion for summary judgment.

It is agreed that plaintiff was a member of the National Maritime Union of America, an affiliate of AFL-CIO, and

that there was a working agreement between the union and various companies and agents, including the defendant.[3] In substance the agreement provides that an employee who feels he has been unjustly treated or subjected to unfair consideration shall endeavor to have his grievance adjusted by pursuing certain grievance procedures and if a mutually satisfactory settlement is not thereby affected the dispute will be promptly referred to an impartial arbitrator for decision and disposition.

The plaintiff claims that he rightfully demanded that he be put ashore and demanded payment of his wages; that these demands were refused; that when the voucher was paid at Galveston, Texas, he demanded overtime pay, adjudgment of the difference in the cost of inferior flight accommodations actually provided an accommodations as agreed, and the other minor items expended for excess baggage charges and limousine fare but the demands were refused; that he then complained to the Galveston representative of his union but was advised to write a letter to the union representative in Yokohama, Japan and report his alleged mistreatment. Instead of writing the letter plaintiff went to Baltimore, employed counsel and this litigation followed. The defendant denied all of plaintiff's claims. It is agreed that no steps were taken under the grievance procedure of the collective bargaining agreement in an effort to resolve the disputes which has arisen between plaintiff and his employe.

In a short statement, orally from the bench, the district court expressed no view as to the merits of the dispute but granted the motion for summary judgment, holding in effect, that the plaintiff's claim must be processed in accordance with procedures established in the collective bargaining agreement, that matters of this sort should be

[3] This agreement was introduced in evidence as Joint Exhibit No. 1.

left to procedures set up between the union and the employer pursuant to the "policy" established primarily in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a policy characterized by the district court as most important "lest this Court be inundated with small claims of the type which has been presented to the court today."

In granting the motion for summary judgment the court denied to the plaintiff a hearing on the merits and it clearly appears that there were genuine issues of material fact which could not be resolved on the basis of the pleadings, deposition, or the insufficient affidavit filed by the defendant in support of its motion. Summary judgment was granted on the ground and for the reason that the plaintiff's claims *must* first be processed in accordance with procedures established in the agreement between his employer and the union. This determination was tantamount to a ruling that the court lacked jurisdiction.

Title 28 U.S.C. § 1333 provides:

> "The district courts shall have original jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The controversy here was between a merchant seaman and the owner of an American merchant vessel, a controversy maritime in nature, and the cause of action was based, at least in part, upon the alleged violation by the defendant of a federal statute providing penalties for delay in the payment of plaintiff's wages "without sufficient cause."

The pertinent statute, 46 U.S.C. § 596, provides, in substance, that any sum found to be due as a penalty for such delay shall be recoverable "as wages in any claim made before the court." We think the phrasing of the statute, "in any claim made before the court," is highly significant in the context of the instant case and carries the clear

implication that the district court should determine whether payment of wages was delayed and, if so, should award to plaintiff the prescribed penalty "as wages" unless the cause for such delay is found to be "sufficient."

Since ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them.[4] The right to prompt payment of seamen's wages is especially favored by the law. The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[5] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty. Only recently the Supreme Court of the United States spoke of "the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 528.

To effectuate this well-established governmental and judicial policy the Congress has enacted statutes to insure prompt payment to the seaman of wages due him. As provided in 46 U.S.C., § 596, wages in foreign trade are due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever happens first, and he is entitled to one-third of his wages at the time of discharge. If the master fails to pay seamen, "without sufficient cause," the master or the owner is subjected to the payment of double wages for each day of delay. Vigorous

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[4] Benedict on Admiralty, Vol. 4, sec. 621, p. 282.

[5] A well documented discussion by Judge Frank concerning the historical protection of seamen is found in *Hume* v. *Moore-McCormack Lines*, 121 F.2d 336 (2 Cir. 1941), *cert. denied*, 314 U.S. 684.

judicial interpretations have been given to the wage statutes. The Supreme Court has said that the statute pertaining to the payment of wages intend to secure *prompt* payment and are designed to prevent "arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."[6] The courts strongly disapprove denial of prompt payment of seamen's wages rightfully due them.[7] The wage statutes are to be liberally construed in favor of the seaman.[8] As hereinbefore noted, overtime pay is embraced within the meaning of wages. If delay in payment of wages is established the burden of proof is on the ship owner to show that his delay was justified.[9]

The district court, in reaching its decision, relied principally upon recent cases which hold that where an employee seeks to sue his employer and/or his union on account of an alleged breach of his collective bargaining *rights emanating from a collective bargaining contract* between his employer and his union he must first show that he has attempted to pursue the contract grievance procedure as his mode of redress. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Only if the union refuses to press the claim or if it presses it perfunctorily, then the employee may seek redress in the courts. *Republic Steel Corp.* v. *Maddox, supra; Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca* v. *Sipes* the Court stated:

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[6] *Collie* v. *Ferguson*, 281 U.S. 52, 56 (1930). Involved was 46 U.S.C. § 596. Insolvency of the owner and arrest of the vessel were held to be "sufficient cause" for delayed payment of wages and to relieve the owner from the statutory liability for double wages.

[7] *Prindes* v. *The S.S. African Pilgrim*, 266 F.2d 125, 128 (4 Cir. 1959); *The Sonderborg*, 47 F.2d 723 (4 Cir.), *cert. denied*, 284 U.S. 618 (1931); *The Lake Gaither*, 40 F.2d 31 (4 Cir. 1930).

[8] *Johnson* v. *Isbrandtsen Co.*, 190 F.2d 991, 993 (3 Cir. 1951). Supp. 441, 443 (E.D. Pa. 1946).

[9] *Butler* v. *United States War Shipping Administration*, 68 F. Supp. 441, 443 (E.D. Pa. 1946).

"• • • Since the employee's claim is based upon *breach of the collective bargaining agreement*, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650." (386 U.S. at p. 184.) (Emphasis supplied.)

The defendant cites certain cases purporting to show that the courts have been applying the principles approved in *Maddox* and *Sipes* to the maritime area of the law. Reference is made to *Freedman* v. *National Maritime Union of America*, 347 F.2d 167 (2 Cir. 1965), *cert. denied*, 383 U.S. 917 (1966); and *Brandt* v. *U. S. Lines*, 246 F. Supp. 982 (S.D.N.Y. 1964).

Freedman, supra, involved a charge by a seaman of improper discharge by the employer. The latter contended that the plaintiff seaman had disobeyed an order to steer the vessel properly. The U. S. Coast Guard had previously found the plaintiff guilty in connection with the same incident and had disciplined him. After investigation the plaintiff's union refused to arbitrate the grievance. Prior to litigation, because of the company's refusal to rehire him and the union's failure to prosecute his grievance, plaintiff had filed a series of charges with the National Labor Relations Board. Finding no basis to support plaintiff's claim of discriminatory treatment, no complaint was issued. The district court granted the defendant's motion for summary judgment, ruling that the papers which had been submitted demonstrated that the plaintiff was not discharged without cause, that the union did not act in bad faith and that plaintiff's charges of conspiracy and fraud were conclusory.

Brandt, supra, concerned a similar charge by a seaman of unfair discharge. After the union had investigated it concluded that the case lacked merit and refused to seek arbitration. The seaman sued both the employer and the union to compel them to arbitrate the propriety of his discharge. Summary judgment was granted in favor of the defendants since there were no facts alleged from which the court or jury could reasonably find that the union acted arbitrarily or in a discriminatory manner.

The vital point of distinction between *Maddox, Sipes, Freedman* and *Brandt* on the one hand, and the instant case on the other, is that here the plaintiff is seeking the judicial adjudication or enforcement of his rights created by a federal statute which applies solely to seamen and the payment of their wages.

In the case of *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940), there is involved the interpretation and application of Title 46, U.S.C. § 597, which also pertains to the payment of seamen's wages. One of the questions presented was whether a "war bonus" to be paid in addition to basic wages constituted "wages" within the meaning of the statute. There it was held that the courts of the United States are required to assume jurisdiction of such a controversy arising under the statute.

The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer is an additional mode of redress for such seaman and which he may pursue, at his election. However, such procedure is of fairly recent vintage, having matured in viable form during the period when labor was making substantial gains on the economic front. Section 596 antedated by long years the grievance procedure provided in the union contract. To construe the grievance procedure as a mandatory substitute for the seaman's statutory right to prompt payment of his wages is, in our opinion, palpable error. Statutes enacted out

of considerations of public policy, such as section 596 pertaining to seamen's wages, should not and cannot be nullified or circumvented by private agreement.

In our research of this question we discovered numerous cases in which the amounts involved were much less than the amounts claimed by the plaintiff in this case. We need not specifically cite these cases but, in passing, we are prompted to note them in light of the district court's expressed fear that it will be inundated with small claims of the type involved in the instant case.

The case will be reversed and remanded to the district court for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

HAYNSWORTH, *Chief Judge*, dissenting:

I dissent.

The claims pressed by Arguelles are almost totally dependent upon an interpretation and application of the collective bargaining agreement between his labor union and his employer. Arguelles invokes that agreement; he is bound by it, including its requirement of resort of its grievance and arbitration and procedures for the settlement of contract disputes. The majority foregoes the obvious advantages of having such claims adjudicated within the framework of that agreement because it perceives that the special protection traditionally accorded seamen with respect to prompt payment of wages as evidenced by 46 U.S.C.A. § 596 requires that wage claims be heard initially in a district court. I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative skilled in the interpretation of the collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners[1] were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working conditions or to lend him protection at the time of discharge. The statute protected seamen "from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Ferguson*, 281 U.S. 52, 55 (1930).

The circumstances requiring protection of seamen from discharge in foreign ports without sufficient funds are now largely dissipated. Though the dissipation may have resulted, in large part, from the existence of the statute, collective bargaining agreements now bar the return of the harsh practices of the Eighteenth Century.[2] The collective bargaining agreement and the maritime union stand as protection to the seamen, guarding against overreaching by the employer. When a claim under the statute is wholly, or largely, dependent on an interpretation and application statute is not frustrated by resort to grievance procedures established between the employer and the union.

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[1] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133; Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

[2] I do not mean to intimate that the statute has no continuing utility. Clearly the union and the employers could not, under the guise of the collective bargaining agreement, negate seaman's rights under the statute. Nor would I require resort to grievance procedures when a claim is based entirely upon the statute. See, *e.g.*, *Prindes* v. *S.S. African Pilgrim*, 4 Cir., 266 F.2d 125 (wrongful withholding of amount admittedly due in order to secure release to claim for further wages). Suits under the statute should also be allowed when no other means to adjudicate the claim is clearly or readily available. See, *e.g.*, *Gkiafis* v. *S.S. Viosonas*, 4 Cir. 387 F.2d 460 (claim of foreign seaman).

To be balanced against the purpose of the act providing for prompt payment of wages of seamen, 46 U.S.C.A. § 596, is the purpose of the federal labor laws. These laws "seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." *Vaca* v. *Sipes*, 386 U.S. 171, 182. When a claim is based on the terms of the collective bargaining agreement,[3] the Supreme Court, interpreting § 301(a) of the Labor Management Relations Act,[4] has required resort to the grievance processes under that agreement.[5]

> Since the employee's claim is based upon the breach of the collective bargaining agreement, he is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.
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> *Vaca* v. *Sipes, supra* at 184.

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[3] The claim here is based almost entirely on the collective bargaining agreement. The overtime wage claim is dependent upon an interpretation of the agreement. The statutory claim under 46 U.S.C.A. § 596 requires an interpretation of the agreement to answer the question whether the ship was in port while anchored off Cape St. Jacques.

[4] 29 U.S.C.A. § 185(a).

[5] See *TWUA* v. *Lincoln Mills*, 353 U.S. 448; *General Electric Co.* v. *Local 205, UEA*, 353 U.S. 547; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650; *Vaca* v. *Sipes*, 386 U.S. 171. Not only is resort to arbitration required but courts should refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

Mandatory use of grievance procedures is of great benefit both to the employer and to the union. And it cannot be said, "in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted the procedures and found them so. . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.

I see nothing in the language or purpose of 46 U.S.C.A. § 596 which requires the disruption of collective bargaining agreements governing maritime claims contrary to the intention of Congress as expressed in § 301(a) of the Labor Management Relations Act.[6] I would require the use of union grievance and arbitration procedures in settling a seaman's claim when that claim is based on the collective bargaining agreement between his union and his employer, an agreement by which the employee is bound and which, properly interpreted, determines his rights.

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[6] 29 U.S.C.A. § 185(a).

Judgment of Court of Appeals

(Filed April 4, 1969)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

vs.

U. S. BULK CARRIERS, INC.,
a body corporate,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; that this case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SAMUEL W. PHILLIPS,
Clerk.